

RACE TO THE TOP ASSESSMENT PROGRAM FREQUENTLY ASKED QUESTIONS ON INTELLECTUAL PROPERTY RIGHTS



U.S. Department of Education
Washington, DC 20202

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FREQUENTLY ASKED QUESTIONS ON THE RACE TO THE TOP ASSESSMENT PROGRAM AND INTELLECTUAL PROPERTY RIGHTS

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Introduction

The purpose of this document is to provide information about the Race to the Top Assessment program grantees' requirements related to intellectual property rights. The 2010 notice inviting applications (NIA) for the Race to the Top Assessment Program included the following program requirement:

Unless otherwise protected by law or agreement as proprietary information, make any assessment content (i.e., assessments and assessment items) developed with funds from this grant category freely available to states, technology platform providers, and others that request it for purposes of administering assessments, provided they comply with consortium or state requirements for test or item security.

Please note that the information in this document is not legal advice. Please consult with your legal counsel prior to using this guidance to ensure that it is appropriate to your particular situation.

This guidance provides the U.S. Department of Education's interpretation of various statutory provisions and does not impose any requirements beyond those included in the American Recovery and Reinvestment Act of 2009 (ARRA), the Race to the Top Assessment program NIA, and other applicable laws and regulations. In addition, it does not create or confer any rights for or on any person.

Additional program guidance is provided on the Race to the Top Assessment program Web site at www.ed.gov/programs/racetothetop-assessment. If you have any questions or comments on this document, please e-mail racetothetop.assessment@ed.gov, call (202) 453-7246, or write to us at the following address: U.S. Department of Education, Race to the Top Assessment Program, 400 Maryland Avenue, SW, Room 7C110, Washington, DC 20202.

1. What intellectual property issues should a consortium consider when procuring products with Race to the Top Assessment funds?

Each consortium should be cognizant of intellectual property ownership issues when negotiating and executing agreements with contractors. The owner of a copyrighted work has the exclusive right to sell, distribute, reproduce, and display the work and to produce derivative works (except for the Federal government's license for those works developed or purchased with Federal grant funds, as discussed in question 2). Absent an agreement, the contractors that produce works for a consortium will retain copyright ownership in those works. Therefore, if the consortium wants to retain any of the aforementioned usage rights in procured works from contractors, the consortium should make sure there is appropriate contract language that grants the consortium those usage rights.

The consortium can include language in a contract that will *transfer ownership* of copyrighted works created by the contractor. In many instances, contractors will be hesitant to transfer ownership in works they create. The consortium could also include language that will grant the consortium a *license* to use the works developed under an agreement. The consortium should consider what rights of use are important in negotiating and tailoring licensing language.

The consortium should consult with its legal counsel to ensure that agreements with contractors grant the consortium the rights it wishes to retain in the works produced with Race to the Top Assessment (RTTA) funds.

2. What are the Department’s expectations related to the grant’s Program Requirement 6 from the Notice Inviting Applications (NIA): “Unless otherwise protected by law or agreement as proprietary information, make any assessment content (i.e., assessments and assessment items) developed with funds from this grant category freely available to states, technology platform providers, and others that request it for purposes of administering assessments, provided they comply with consortium or state requirements for test or item security”?

The Department expects that the consortium will establish rules and procedures to protect the security of assessments and assessment items. Interested parties (such as states and technology platform providers) that agree to abide by the consortium’s rules must be granted access to those materials developed with grant funds.

Consistent with 34 CFR § 80.34, the Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for Federal government purposes, the copyright in any work developed under a grant (or contract under a grant) in this program, and any rights of copyright to which a grantee or contractor purchases ownership with grant support.

3. Can the consortium or contractors make derivative works from products produced with RTTA grant funds?

A derivative work is a work based on or that builds upon a previously created, copyrighted work. Neither Program Requirement 6 nor the Department’s interest codified in 34 CFR § 80.34 prevent contractors or the consortium from making derivatives of products they own that are developed with RTTA funds.

Through an agreement, the consortium and contractor should outline each party’s copyright interests (including the ability to create derivatives) in developed works. Absent any applicable agreement or contract, the right to make derivative works remains with the original author of the copyrighted work.

If the consortium or its contractors, using their own funds, create derivatives of works created with RTTA funds during or after the grant period, neither Program Requirement 6 nor 34 CFR § 80.34 will apply to the derivative works. Program Requirement 6 only applies to the RTTA grant; the Department’s interest codified in 34 CFR § 80.34 only applies to works funded with U.S. Department of Education grant funds.

4. What should the consortium do to comply with the Department’s intellectual property rights in RTTA-funded works (*i.e.*, can the Department provide sample language for use in contracts for the consortium to consider?)

There are two requirements that the consortium must consider when entering into agreements with contractors:

- a. As noted in question two, under 34 CFR § 80.34, as well as Program Requirement 6, the Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for Federal government purposes, the copyright in any work developed under a grant (or contract under a grant) in this program, and any rights of copyright to which a grantee or contractor purchases ownership with grant support. The Department encourages the consortium to include a reference to the Department’s license in agreements with contractors. The following sample notification clause is provided to help the consortium with its respective procurement plans. The consortium should consult with its legal counsel prior to any use of the language provided below.

“Any contract with a content developer under the Race to the Top Assessment grant is subject to a license held by the United States Department of Education (the “Department”). Consistent with 34 CFR § 80.34, [CONTENT PROVIDER] acknowledges that the Department reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use, for Federal government purposes, the copyright in any work developed under this Agreement, and any rights of copyright to which a grantee or contractor purchases ownership or license with grant support.

Pursuant to the Cooperative Agreement between [CONSORTIUM] and the Department effective as of [DATE], [CONTENT PROVIDER] acknowledges that it must make any assessment content (*i.e.*, assessments and assessment items) developed under this Agreement freely available to states, technology platform providers, and others that request said content for purposes of administering assessments. [CONTENT PROVIDER] must also comply with the [CONSORTIUM]’s requirements for test or item security. [CONTENT PROVIDER] will not be required to make any assessment content available to other parties if the assessment content is protected by law or agreement as proprietary information.

The Department also may ask [CONTENT PROVIDER] to make assessment content developed under this Agreement freely available online, unless said content is protected by law or agreement as proprietary information.

Any content developed by [CONTENT PROVIDER] prior to the development of work under this Agreement is not subject to the Department’s license. However, any prior content merged with content developed under this Agreement is subject to the Department’s license. Furthermore, any pre-existing work purchased

outright or licensed is subject to the Department's license articulated in 34 CFR § 80.34.”

- b. Under 34 CFR § 75.620(b), the consortium must include the following statement in publications developed with RTTA funds:

“The contents of this (*insert type of publication; e.g., book, report, film*) were developed under a grant from the Department of Education. However, those contents do not necessarily represent the policy of the Department of Education, and you should not assume endorsement by the Federal Government.”

5. What should the consortium consider regarding ownership of procured products once the grant period has expired?

Each consortium should consider what copyright interests it would like to purchase as part of a contract, and specifically determine which party or parties within the consortium will own purchased copyright interests. With copyright ownership, the consortium may reproduce, distribute, and otherwise utilize the work in any manner, including the right to transfer copyright interests as it chooses.

It is each consortium's responsibility to determine how to manage the ownership of copyrighted works procured with RTTA funds. The consortium is encouraged to develop a plan for ensuring the sustainability of its assessment system, including for the materials developed during the grant period.

That plan should include an agreement or policy that determines which party or parties within the consortium own the copyright interests in, or have a license to use, works procured with grant funds. For example, a consortium may decide to execute an agreement amongst its members stating that all works procured with RTTA funds shall be jointly owned by the consortium's members.

6. Does the requirement to make assessments and items freely available apply to items or assessments developed after the grant period has ended? Does the Department's license codified in 34 CFR § 80.34 apply to items developed after the grant period?

Program Requirement 6 is specific to the RTTA program and applies only to items funded in whole or in part by the RTTA program during the grant period. However, in accordance with 34 CFR § 80.34, the Department's license will perpetually apply to all works developed with Department grant funds.

For example, if, after the grant period ends, a consortium or its member states create items for the assessment system using other Department funds (such as the funds provided for state assessments under section 6111 of the Elementary and Secondary Education Act), Program Requirement 6 would not apply but the Department would be able to reproduce, publish, or otherwise use, and to authorize others to use these items for Federal government purposes pursuant to 34 CFR § 80.34.

7. Does the Department's license articulated in 34 CFR § 80.34 and Program Requirement 6 apply to pre-existing content utilized by the consortium or its contractors to create finalized work products?

The Department issued the RTTA grant to provide funding to consortia to develop an operational assessment system. 34 CFR § 80.34 grants the Department a license for works *developed* with Department grant funds. The final operational assessment system provided by the consortium and its contractors would be developed or delivered with RTTA funds. Therefore, the Department would have the ability to reproduce, publish, or otherwise use, and to authorize others to use, the final operational assessment system developed with RTTA grant funds, including any modifications made with grant funds to pre-existing work.

Even if a final system includes pre-existing material, the Department would have the ability to use this final product under its license codified in 34 CFR § 80.34. However, the Department would not be able to use the pre-existing material independently without permission of the copyright owner.

Pursuant to Program Requirement 6, the Department similarly expects consortia to make RTTA-funded assessments and items, including the pre-existing material within, freely available to the appropriate parties.